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In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN J. HURLEY, INDIVIDUALLY, AND
THE SOUTH BOSTON
ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

v.

IRISH-AMERICAN GAY, LESBIAN AND
BISEXUAL GROUP OF BOSTON,
AN UNINCORPORATED ASSOCIATION BY AND THROUGH,
TIMOTHY DALEY, BARBRA KAY AND CATHLEEN FINN,
ACTING ON THEIR OWN BEHALF AND ON BEHALF OF
MEMBERS OF THE ASSOCIATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP M. CRONIN
Counsel of Record
PEABODY & ARNOLD
50 Rowes Wharf
Boston, MA 02110
(617) 951-2100

CHARCRETIA V. DIBARTOLO
PEABODY & ARNOLD
50 Rowes Wharf
Boston, MA 02110

MARY L. BONAUTO
GAY & LESBIAN ADVOCATES
& DEFENDERS
P.O. Box 218
Boston, MA 02112

GRETCHEN VAN NESS
ATTORNEY AT LAW
60 State Street
Boston, MA 02109

JOHN WARD
ZALKIND, RODRIGUEZ, LUNT & DUNCAN
65A Atlantic Avenue
Boston, MA 02110

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The Respondent, Irish-American Gay, Lesbian and Bisexual Group of Boston, ("GLIB"), respectfully requests that this Court deny the petition for Writ of Certiorari seeking review of the opinion of the Supreme Judical Court of the Commonwealth of Massachusetts in this case. The opinion is reported at 418 Mass. 238 (1994) and appears in the Petition for Writ of Certiorari at Appendix C1.

Reasons Why the Petition Should be Denied

I. The Petition Should Be Denied Because This Case Presents No "Special and Important Reasons" Warranting the Exercise of This Court's Extraordinary Jurisdiction.

Rule 10.1 of the Rules of the Supreme Court of the United States provides that a writ of certiorari will be granted "only when there are special and important reasons therefor." At issue in this case is the decision of the Massachusetts Supreme Judicial Court upholding the trial court's finding that Boston's annual Evacuation Day/St. Patrick's Day Parade is a place of public accommodation under state law, and upholding the trial court's finding that the Petitoners discriminated against the Respondents on the basis of sexual orientation in violation of state law by excluding them from this public celebration.

Nothing about this state-law decision makes it "special and important" under Rule 10.1. The decision fully comports with the binding precedent of this Court, as well as the well-settled principles guiding application of the public accommodations law in Massachusetts. In addition, the decision is fully supported by the facts adduced at trial, which were closely scrutinized by the Supreme Judicial Court. For the reasons discussed more fully below, this Court should decline to exercise its extraordinary jurisdiction in this case.

1. *The Decision of the Massachusetts Supreme Judical Court Presents No Conflict with the Decisions of Any Other State or Federal Court*

Pursuant to Rule 10.1(b)[1] of the Rules of the Supreme Court, a writ of certiorari may be granted when a state court "has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United

[1] Subsection (a) of Rule 10.1 does not apply in this case.

States court of appeals." The decision of the Massachusetts Supreme Judicial Court presents no conflict with the decision of any other high court and it presents no conflict with any decision of a United States Court of Appeals. Petitioners attempt to create a conflict by reaching for the 1993 decision of the United States District Court of the Southern District of New York in *New York Board of Ancient Order of Hibernians* v. *Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993),[2] but even a cursory examination of that decision shows that the two cases are inapposite.

In the *Dinkins* case, the District Court, based upon the parties' agreed statement of uncontested facts, made detailed factual findings regarding the following: the history and composition of New York City's St. Patrick's Day Parade (A6-A7); the identity of the Parade's sponsor ("The AOH is an organization comprised of Roman Catholic men of Irish descent . . ." A6); the financing of the Parade ("The AOH and the Parade Committee privately finance the Parade exclusively by means of private donations." (A6); the theme of the Parade ("The Parade celebrates, *inter alia*, freedom and Irish culture and heritage." (A7); the application process ("The AOH has adopted rules for the Parade to prevent any group or person from using the Parade as a vehicle or forum to pursue any . . . agenda inconsistent with the message, values and viewpoint of the AOH, or . . . with the teachings of the Roman Catholic Church." (A7-A8); the nature of the holiday commemorated by the Parade (St. Patrick's Day) (A6-A7); the Parade route ("For over seventy years the Parade has taken place on Fifth Avenue starting at 11:00 a.m. on the day of the Roman Catholic liturgical feast day of St. Partick." (A6); and the applicable law (A18-A25). Based on its analysis, the District Court concluded that New York's St. Partick's Day Parade is the expression of the Ancient Order of Hibernians and is, therefore, protected by the first amendment to the United States Constitution.

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[2] Petition for Writ of Certiorari at Appendix A1.

In the *Irish-American Gay, Lesbian & Bisexual Group of Boston* case, the Supreme Judical Court upheld the trial court's detailed factual findings regarding the following: the history and composition of Boston's Evacuation Day/St. Patrick's Day Parade (C6-C8); the identity of the Parade's sponsors (the South Boston Allied War Veterans Council); the financing of the Parade ("Until 1993, the City provided approximately twenty-five percent of the Parade's total costs." (B17); the theme of the Parade ("[I]t is 'impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.'" (C13); the application process ("there are no written procedures, criteria, or standards for selecting participants or sponsors of the parade." (C8); the nature of the holidays commemorated by the Parade ("The judge noted Evacuation Day 'commemorates General Washington's initial military victory over the British in 1776, and the British departure from South Boston. It is an officially recognized historical event in Massachusetts and a Suffolk County holiday . . .'" (C5 n.7); the Parade route ("The Parade has followed substantially the same route in South Boston for at least forty-seven years . . ." (C7); and the applicable law (C9-C16). Based on its close scrutiny of the facts found by the trial court, the Supreme Judicial Court determined that Boston's Evacuation Day/St. Patrick's Day Parade constitutes a place of public accommodation under Massachusetts General Laws c.272, sections 92A and 98, and it rejected the Petitioners' argument that the Parade was an exercise of their first amendment rights. (C14).

Both the District Court and the Massachusetts courts followed the applicable decisions of this Court in analyzing the asserted first amendment claims. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) (not all conduct is protected speech even if so labeled by the actor); *Clark* v. *Community for Creative Nonviolence*, 468 U.S. 288, 293 n.5 (1984) (one seeking protection under the first amendment must show that he is entitled to it, as there is no presumption of expressivness); see also *City of Dallas* v. *Stanglin*, 490 U.S. 17, (1989) (court may

properly test sincerity of first amendment claim but not the "truth" of protected content). That the two courts reached different conclusions is evidence of this simple fact: each Parade is unique and the two Parades are very different from the other.

In *Dinkins*, the District Court described the differences between the two Parades as follows:

> The Boston Parade celebrates not only St. Patrick's Day, but also Evacuation Day. Evacuation Day commemorates the March 17, 1776 departure of British troops from Boston. The parade conveys a general celebratory message in general support of 'traditional values.' . . . The fact that this 'traditional values,' multi-purpose parade requires 'detailed participation by city agencies in planning and execution' clearly illustrates the civic nature of the parade. . . . In light of these factors, the [Massachusetts] Court held that the defendant permit-holders were 'custodians of a civic celebration.'

(A23-24). The Massachusetts Supreme Judicial Court described the New York Parade as follows:

> At the outset, we noted that *Hibernians* is distinguishable from the facts of this case because in *Hibernians*, the judge found that the Ancient Order of Hibernians in fact used the parade as a means of expression, that the admission process was selective, and that it had adopted rules to prevent parade participants from using the parade as a forum to express views inconsistent with the views of the Ancient Order of Hibernians or the Roman Catholic Church.
>
> We also note that the New York parade celebrates only St. Patrick's Day, while the Boston parade celebrates, in addition, Evacuation Day.

(C13 & n.17).

Not every St. Patrick's Day Parade is identical. When the outcome of two cases is compelled by the unique facts of each case, there is no conflict within the meaning of Rule 10.1(b).

2. *No Federal Question is Presented in this Case, and the Decision of the Massachusetts Supreme Judicial Court Fully Comports with the Binding Precedent of this Court*

Rule 10.1(c) provides that a writ of certiorari may be granted when a state court decides "an important question of federal law which has not been, but should be, decided by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." The ruling of the Supreme Judicial Court could not be clearer. In this case the Commonwealth's court of last resort has not decided a federal question — it has properly determined the meaning of an important state statute: the Massachusetts public accommodations law. Massachusetts General Laws c.272, §§92A and 98. First enacted in 1865 and amended and expanded numerous times since that date, most recently in 1989 to prohibit discrimination on the basis of sexual orientation, the public accommodations statute embodies the Commonwealth's strong public policy against all forms of discrimination in places of public accommodation. The decisions of the Supreme Judicial Court recognizes this vital public policy and have directed a broad and inclusive reading of the statute. *Concord Rod & Gun Club* v. *Massachusetts Comm'n Against Discrimination*, 402 Mass. 716, 720 (1988) (public accommodations law serves a "broad, remedial purpose" and should be given a "broad, inclusive interpretation") (quoting *Local Finance Co.* v. *Massachusetts Comm'n Against Discrimination*, 355 Mass. 10, 14 (1968)).

The Supreme Judicial Court and the trial court fully considered and rejected the Petitioner's first amendment claims:

> [T]here was no error in [the trial court's] finding that the parade was not used by the council for expressive purposes, and that, as a result, the defendants could not cloak their discriminatory acts in the mantle of the First Amendment.

C15. As the Supreme Judicial Court recognized, because there is no presumption of expressive activity, invoking the first amendment begins the court's inquiry — it does not end it. *Clark, supra.* The Supreme Judicial Court properly determined that there is no expressive purpose in this Parade.

The decision of the Supreme Judicial Court is correct as it comports with the binding precedent of this Court. In *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court first considered whether a state public accommodations law infringed upon the first amendment free association rights of members of a private club. In that case, this Court determined that the operation of the public accommodations law abridged no more speech and association than was necessary to accomplish the important purposes of the non-discrimination statute. 468 U.S at 629. The decision of the Supreme Judicial Court in this case, in contrast, presents in many ways an easier question. First, the public accommodation at issue is, in the words of the trial court, an "open recreational event," and not a private club. B27. Second, both the trial court and the Supreme Judicial Court found that there was no basis for the Petitioner's assertion that the Parade constitutes their speech or expressive association. (B23-B25; C13-C15). In this case, there could be no infringement, however slight, of the Petitioner's first amendment rights because this Parade never fell within the reach of the first amendment. This case presents no important question of federal law which has not been settled by this Court.

II. The Petition Impermissibly Seeks to Have This Court Sit as a Court of Error Over the Massachusetts Supreme Judicial Court

As the preceding discussion has shown, the Petitioners have presented no basis for the exercise of this Court's extraordinary jurisdiction under Rule 10.1 of the Rules of the Surpeme Court. Petitioners' sole purpose in seeking a writ of certiorari is to have this Court sit as a court of error and reverse the decision of the Massachusetts Supreme Judicial Court. This is not the purpose of a writ of certiorari. The facts fully support the Supreme Judicial Court's decision.

1. *The Decision of the Massachusetts Supreme Judicial Court is Fully Supported by Substantial Evidence.*

The Supreme Judicial Court closely scrutinized the facts found by the trial court; see e.g., C5-C7 & n.9, and determined that the findings of the trial court were supported by the evidence. Generally this Court will not disturb factual findings and conclusions of law based on subtantial evidence. *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925); *Portland Ry. Co.* v. *Railroad Comm'n*, 229 U.S. 397, 412 (1913). The Supreme Judicial Court recognized the fact-intensive nature of this case when it stated the following:

> [W]e uphold the findings and rulings of the judge based on the record before us, particularly the history and nature of the parade here at issue. We do not suggest that every parade is nonexpressive or that every parade is necessarily a place of public accommodation. Rather, we base our conclusions on the unique nature of the facts found as to the parade in controversy.

(C13-C14 n.18). Under these circumstances, this Court should decline to disturb Supreme Judicial Court's findings of fact and conclusions of law in this case.

Conclusion

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PHILIP M. CRONIN, ESQ.
PEABODY & ARNOLD
50 Rowes Wharf
Boston, MA 02110
(617) 951-2100
Counsel for Respondent